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No. 88-1178

In the Supreme Court of the United States

OCTOBER TERM, 1988

THOMAS E. KEANE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner is entitled to a writ of error coram nobis vacating his 1974 mail fraud conviction even though (1) petitioner's challenge to the instructions given at his trial was fully considered and rejected on direct appeal; (2) petitioner suffers no current civil disability as a result of his conviction; and (3) the indictment states an offense and the evidence presented at trial supports a conviction, although the jury instructions may have been erroneous.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 852 F.2d 199. The opinion of the district court (Pet. App. 15a-24a) is reported at 678 F. Supp. 708.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 1988. A petition for rehearing was denied on October 17, 1988. Pet. App. 14a. On November 28, 1988, Justice O'Connor granted an extension of time to and including January 15, 1989, within which to file the petition. The petition was filed on January 14, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1974, petitioner was convicted of mail fraud, in violation of 18 U.S.C. 1341, for acts committed in connection with his service on Chicago's City Council. His conviction was upheld on direct appeal. 522 F.2d 534 (1975), cert. denied, 424 U.S. 976 (1976). Petitioner served his sentence, he was paroled in 1978, and in 1980 he was released from parole. In 1987, this Court decided *McNally* v. *United States,* 483 U.S. 350, in which it held that the mail fraud statute did not prohibit schemes to defraud citizens of their "intangible right" to honest government services. Petitioner subsequently sought a writ of error coram nobis in the United States District Court for the Northern District of Illinois. He requested that the court vacate his conviction and order the government to return his fine of $27,000. The district court denied the application. Pet. App. 15a-24a. The court of appeals affirmed. *Id.* at 1a-13a.

1. The evidence at petitioner's trial showed that while he served on Chicago's City Council petitioner formed a partnership that purchased more than 1,800 tax delinquent properties at Cook County scavenger sales. Petitioner selected the parcels for purchase based on his knowledge about where City agencies intended to buy property. The partnership held the parcels through an Illinois land trust, a device that enabled the beneficial owners to conceal their interests in the partnership. Petitioner then used his influence as chairman of the Council's Finance Committee to have special assessment liens removed from most of his parcels for much less than the value of the liens.[1] Pet.

[1] To remove the liens, it was necessary to cause foreclosure proceedings to be instituted by the City. A subcommittee of the Finance Committee recommended a minimum bid, usually at least 30% of the lien on the property, necessary to obtain the property free of the encumbrance. The City Council voted on the subcommitte's recommendation and the Cook County Circuit Court regularly approved the

App. 2a-3a, 16a-18a. Finally, petitioner "induced his friends in public agencies to buy these parcels," usually at much more than the market price. *Id.* at 3a. For example, the evidence showed that the Metropolitan Sanitary District bought 102 parcels that it thought were worth $150 each from petitioner for $775 per parcel. *Id.* at 18a.

The indictment described the scheme in detail and charged that petitioner had defrauded the citizens of Chicago of their intangible right to petitioner's faithful and loyal services and their intangible right to have the city's business conducted free from fraud and deceit. The court's charge instructed the jury that it need not find that petitioner made a profit in order to convict him. Rather, it was sufficient under the charge that the jury find that petitioner had acted in his official capacity without telling anyone about his private interest. At trial, petitioner objected to the "intangible rights" aspects of the indictment and the jury instructions. Pet. App. 15a-16a, 18a. The district court and court of appeals disagreed with petitioner's position, however, and this Court denied his petition for a writ of certiorari. *Id.* at 3a.

2. In *McNally*, this Court held that mail fraud convictions could not be based on the theory that public officials' conduct had deprived the citizens of their intangible right to honest and impartial government, which the Court concluded was not a property interest protected by the statute. Thereafter, petitioner filed his coram nobis petition, ask-

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resulting proposed minimum bid. As chairman of the Finance Committee, petitioner had the subcommittee recommend minimum bids of about 10% on most of his properties and voted to approve those minimum bids without disclosing his interest in the parcels. Pet. App. 17a. Petitioner was not able to purchase at auction all of the parcels at the "sale" price, but he obtained about 1,000 of the parcels in an unencumbered state at low cost. *Id.* at 3a.

ing that his conviction be set aside and that the government return the fine of $27,000 that he had paid.[2]

The district court denied relief. Pet. App. 15a-24a. It concluded that "the indictment charged, and the evidence showed, that Keane schemed to deceive the citizenry and to deprive it of what is unquestionably property: money and/or confidential government information." *Id.* at 21a. The court explained that in selecting the parcels he bought, petitioner used inside information about where government agencies would be buying land, thus depriving the citizenry of a property interest under *Carpenter* v. *United States,* No. 86-422 (Nov. 16, 1987). In addition, petitioner schemed to have the special assessment liens removed from the parcels at low cost and then to sell them to the City at high cost. Pet. App. 22a.[3]

3. The court of appeals affirmed. Pet. App. 1a-13a. The court first canvassed the history of the writ of coram

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[2] Congress recently amended the federal fraud statutes to provide that a "scheme or artifice to defraud includes a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508. The legislative history of the new provision explains that "[t]his section overturns the decision in *McNally* v. *United States* * * *. The intent is to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change." 134 Cong. Rec. S17,376 (daily ed. Nov. 10, 1988). Petitioner, of course, must be judged according to the pre-amendment version of the mail fraud statute as construed in *McNally*.

[3] There was conflicting evidence at trial as to whether petitioner ultimately made a profit from the scheme, and a state court subsequently determined that he did not. *Chicago ex rel. Cohen* v. *Keane,* 105 Ill. App. 3d 298, 434 N.E.2d 325 (1982). But the mail fraud statute proscribes schemes to defraud, whether or not they are successful, and the district court accordingly concluded that petitioner's "shortcomings as a 'businessman' do not cleanse him of criminal culpability." Pet. App. 23a.

nobis. The court concluded that the writ had been used to correct fundamental factual errors and to raise previously unavailable legal issues. Based on its historical analysis, the court determined that coram nobis "is not a device to relitigate issues fully ventilated at the time of the conviction." Since petitioner had challenged the intangible rights theory at his trial and on direct appeal, the court concluded that he ought not be allowed to challenge that theory now that he is no longer in custody. *Ibid.*

Alternatively, the court stated that "[t]o the extent that a petition for a writ of error coram nobis is a way to relitigate claims," a litigant must show that his conviction "produces lingering civil disabilities" and that the error was the "type of defect that would have justified relief during the term of imprisonment." Pet. App. 7a. The court of appeals then determined that petitioner failed both of those tests.

After observing that petitioner had conceded that he has not been under any existing civil disability as a result of his conviction since his law license has been reinstated, the court expressly disagreed with the Ninth Circuit's conclusion in *Hirabayashi* v. *United States*, 828 F.2d 591 (1987), that coram nobis relief is warranted merely to remove a conviction from a person's record. Pet. App. 8a. The court of appeals also concluded that the fact that petitioner had paid a $27,000 fine did not entitle him to seek coram nobis relief, since the fine was a "sunk cost rather than a continuing disability producing additional injury as time passes." *Ibid.* The court noted (*id.* at 4a) that it was absolutely clear under *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394 (1981), that if petitioner had been found civilly liable for fraud, if he had been assessed $27,000 in damages, and if the judgment had become final, he would not be able to recover the money on account of a subsequent change in the law.

The court next concluded that petitioner had failed to show that he would be entitled to relief under 28 U.S.C. 2255 if he were still in custody. In *Davis* v. *United States*, 417 U.S. 333 (1974), this Court concluded that a change in the substantive law such as the change made by *McNally* must be applied retroactively, but it also made clear that relief is warranted only if, under the change in the law, a conviction could be said to be a "miscarriage of justice." Pet. App. 10a, quoting 417 U.S. at 346. Here, the court of appeals acknowledged, the jury instructions emphasized the "intangible rights" theory. For that reason, the court explained, it would be difficult to uphold the conviction, if it were pending on direct appeal, on the theory that the jury necessarily concluded that petitioner devised a scheme to obtain property as defined in *McNally*. Pet. App. 11a. However, the court found, the indictment plainly stated an offense under *McNally*, as petitioner was charged with using "the City's confidential information about its plans for acquiring property," inducing "the City Council to set a reserve price of only 10% of the special assessments, instead of the usual 30%," and inducing "his friends to buy the parcels, on behalf of public agencies, for more than they were worth." *Id.* at 10a. In that circumstance, the court concluded, petitioner's conviction would not have been disturbed on collateral attack under Section 2255, and should not now be overturned by way of a writ of error coram nobis.

The court summarized: "[T]hree independently sufficient reasons require the denial of relief in the nature of coram nobis. First, the legal contention Keane presents was raised and resolved adversely to him on a full record after the opportunity to ventilate all arguments; second, Keane is not under a civil disability as a result of his conviction; third, the indictment states an offense." Pet. App. 12a.

DISCUSSION

Although the courts below correctly rejected petitioner's claim, review is warranted on account of disagreements among the courts of appeals as to the proper standards for granting coram nobis relief.

1. In *United States* v. *Morgan,* 346 U.S. 502, 506 (1954), this Court noted that relief "in the nature of the ancient writ of *coram nobis* is not specifically authorized by any statute enacted by Congress," but it held that coram nobis relief may be granted pursuant to the All Writs Act, 28 U.S.C. 1651.[4] The Court added that not all errors, but only those "of the most fundamental character," warrant coram nobis relief. 346 U.S. at 512, quoting *United States* v. *Mayer,* 235 U.S. 55, 69 (1914). It stressed that the "[c]ontinuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice." 346 U.S. at 511.[5]

a. This Court has never decided whether coram nobis review is available to reconsider a legal argument that was fully considered on direct appeal. While the Court in *Davis* v. *United States*, 417 U.S. 333 (1974), held that an intervening change in the law that negates the presence of

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[4] "Coram nobis" means "before us." *Black Law's Dictionary* 304 (5th ed. 1979). The name originated because the writ was sought from the court that originally entered judgment, as opposed to the writ of error coram vobis ("before you"), which was sought from an appellate court. *Id.* at 304-305.

[5] While he was a minor, the defendant in *Morgan* had pleaded guilty to a federal charge without waiving his right to counsel, which was an error under *Johnson* v. *Zerbst,* 304 U.S. 458 (1938). The Court allowed him to reopen his federal conviction pursuant to a writ of error coram nobis after he was given a longer term as a second offender upon being convicted of a state offense.

a crime is a basis for collateral attack under Section 2255, persons seeking relief on that basis are still in custody. As the court of appeals observed (Pet. App. 6a-7a), the reasons supporting the reopening of a final judgment to reconsider an issue that has been fully litigated are much less compelling where a litigant is no longer in custody. In that circumstance, the court of appeals held, it is not appropriate for a court to revisit a legal issue that was fully ventilated previously.

That conclusion is contrary to the Second Circuit's decision in *United States* v. *Travers,* 514 F.2d 1171 (1974). In that case the court held that coram nobis relief is available to a litigant who has raised on direct appeal the issue he seeks to raise in his coram nobis proceeding. *Id.* at 1172. Thus, the first factor relied upon by the court below as precluding petitioner from obtaining relief by way of coram nobis review was held by the Second Circuit to authorize that relief.[6]

b. There is a clear and acknowledged conflict among the circuits on the second ground invoked by the court of appeals to support its decision. As the court below recognized (Pet. App. 8a), the Ninth Circuit did not require the coram nobis petitioner in *Hirabayashi* v. *United States,* 828 F.2d 591 (1987), to establish that he was suffering from any continuing civil disability as a result of his conviction. Instead, the Ninth Circuit expressly stated that "*coram nobis* relief is available to prevent manifest in-

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[6] The court below would not allow a litigant to obtain coram nobis review if he had waived his right to pursue a legal issue by failing to appeal. Rather, it concluded that coram nobis relief is available to pursue only those legal issues that were "previously unavailable." Pet. App. 7a. That limited scope is comparable to the scope available for raising factual issues by way of coram nobis. The writ was traditionally available only to correct factual errors, and then only in unusual situations. See *Morgan*, 346 U.S. at 507 & n.9.

justice 'even where removal of a prior conviction will have little present effect on the petitioner.' " 828 F.2d at 606, quoting *Holloway* v. *United States*, 393 F.2d 731, 732 (9th Cir. 1968). The Ninth Circuit's approach is to presume that any conviction has collateral consequences, an approach that is squarely at odds with the approach taken by the court below. 828 F.2d at 606.[7]

In addition to the express conflict on this issue between the Seventh and Ninth Circuits, the Third Circuit recently indicated its lack of confidence as to the proper standard for determining whether a coram nobis petitioner is suffering collateral consequences serious enough to warrant reconsideration of his conviction. See *United States* v. *Osser*, 864 F.2d 1056 (1988). Questioning the approach taken in *Hirabayashi*, the court "admit[ted] to some uncertainty that Osser has established the requisite showing of collateral consequences" by alleging that his conviction resulted in the denial of a pension. *Id.* at 1060. The Third Circuit concluded, however, that it did not have to resolve the matter because the petitioner had failed to raise on direct appeal the issue he sought to raise by way of coram nobis. *Id.* at 1062.

c. There is also an acknowledged conflict among the circuits on the third ground invoked by for the court of appeals to support its decision. In *United States* v. *Mandel*, 862 F.2d 1067 (4th Cir. 1988), the government relied on the decision in this case and argued that coram nobis is not ap-

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[7] In *Morgan*, this Court noted that "[s]ubsequent convictions may carry heavier penalties" as the result of a prior conviction (346 U.S. at 512-513). That statement appears at first blush to support the Ninth Circuit's analysis. In *Morgan*, however, the coram nobis petitioner had actually been "sentenced to a longer term as a second offender" because of the conviction he sought to challenge by way of coram nobis (*id.* at 504). Thus, he plainly was disadvantaged as a result of the conviction that he sought to challenge.

propriate where "the change in the law did not vitiate the criminality of the petitioner's conduct but only brings into question the propriety of the jury instructions." 862 F.2d at 1075. The Fourth Circuit refused to follow the approach taken by the Seventh Circuit in this case. Instead, the Fourth Circuit concluded that coram nobis relief is warranted based on an error in the jury instructions if the instructions permitted the jury to convict the defendants on a theory that was subsequently rejected by this Court. *Ibid.*

The Third Circuit recently adopted an approach similar to that taken by the court of appeals in this case and very different from the approach taken by the Fourth Circuit. In *United States* v. *Stoneman,* No. 88-5294 (Mar. 13, 1989), slip op. 11, another case involving a challenge to a mail fraud conviction, the court acknowledged that the jury instructions were faulty, but it declined to issue a writ of error coram nobis because "[t]he indictment * * * charged and the evidence the jury heard established an offense within the meaning of § 1341, as interpreted by the Supreme Court in *McNally*."[8] The Sixth Circuit, on the other hand, recently granted a writ of error coram nobis overturning a mail fraud conviction in light of *McNally* in *Allen* v. *United States*, No. 88-5250 (Feb. 16, 1989). The court there did not suggest that the standard of review dif-

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[8] The Third Circuit explained in *Stoneman* that the coram nobis petitioner "failed to meet the burden imposed on him in a *coram nobis* proceeding of overcoming the presumption that his conviction was valid. It is not enough for him to show that it *may* have been invalid. This conclusion * * * properly balances the tension between principles of finality and the law's ideal of seeing that no man is improperly convicted. It also serves to distinguish the type of review available on direct appeal from the less searching examination into trial error available on collateral review through the more limited remedy of *coram nobis*." Slip op. 12.

fers in a coram nobis proceeding from the standard of review on direct appeal. The court therefore reversed merely because it concluded that the jury instructions were erroneous. See slip op. 5-6.

In our view, the Fourth and Sixth Circuits erred. "An error in the jury instructions * * * is not the sort of fundamental defect that produces a complete miscarriage of justice" where the defendant could have been convicted, under proper instructions, on the evidence presented at trial. Pet. App. 12a. Indeed, since there can be no serious dispute that petitioner violated the mail fraud statute as construed in *McNally*,[9] it is hard to see how a miscarriage of justice occurred when he was convicted of mail fraud.[10]

2. The aftermath of this Court's *McNally* decision shows that there may be many requests for coram nobis relief whenever this Court decides that courts of appeals have given a criminal statute too broad a construction. In addition, as the conflicts between the decision below and the Second Circuit's decision in *Travers* and the Ninth Circuit's decision in *Hirabayashi* demonstrate, the current disagreement is not limited to intangible rights mail fraud cases. Given the acknowledged conflicts as to what sort of lingering consequences a litigant must demonstrate to obtain coram nobis review and whether coram nobis relief should be granted on account of erroneous jury instructions, together with the uncertainty as to whether coram

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[9] As both courts below concluded, the evidence showed that petitioner used the City of Chicago's confidential information when buying property, had liens removed at 10% of their value rather than the normal 30%, and sold parcels to City agencies at more than their market price. Pet. App. 10a-11a, 21a-22a.

[10] Accordingly, on this point the decision below is not contrary to the Second Circuit's decision in *Travers*. The court there stressed that "there was no sufficient evidence to support [the defendant's] conviction." 514 F.2d at 1178.

nobis review is available to reconsider legal issues that were fully ventilated on direct appeal, we believe that review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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